IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

WEDNESDAY, THE 4TH APRIL 2007 / 14TH CHAITHRA 1929

Crl.Rev.Pet.No. 574 of 1999()

C.M.P.NO.1719/98 IN
CC.470/1996 of JUDL. MAGISTRATE OF FIRST CLASS, PEERUMEDU

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REVN. PETITIONER(S):

1.MANDAKINI SHARMA,
MAHARANI BAGH, RING ROAD,
NEW DELHI – 110 065.

2. BIRENDRA MOHAN SHARMA
DIRECTOR, M/S.RAM BAHADUR THAKUR LTD.,
A-10, MAHARANI BAGH,
RING ROAD, NEW DELHI 110 065.

3. MANISH MOHAN SHARMA,
DIRECTOR, M/S.RAM BAHADUR THAKUR,
LTD., A-10, MAHARANI BAGH,
RING ROAD, NEW DELHI 110 065.

BY ADV. .
SRI.A.M.SHAFFIQUE

RESPONDENT(S):

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1. STATE OF KERALA, REP. BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

2. THE ENFORCEMENT OFFICER,
EMPLOYEES PROVIDENT FUNDS,
SECOND MILE, PALLIVASAL P.O.
CHITHIRAPURAM, IDUKKI.

PUBLIC PROSECUTOR SRI.C.K.SURESH.

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 04/04/1007 THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K.HEMA, J.

Crl.R.P. No.574 of 1999

Dated 4th April, 2007.

O R D E R

The revision petitioners are accused nos.4, 5 and 6 in the case and they filed a petition for discharge under Section 239 of the Code of Criminal Procedure ('the Code', for short).

2. According to petitioners, they have no role in the day-to-day affairs of the company and hence they are not responsible for the conduct of the business. Therefore, they are not directly connected with the affairs of the company, in deducting the employees provident fund etc. No such amounts are entrusted with them and hence they cannot be made liable personally for the default in payment of contribution. Revision petitioners produced a document to prove that they have no role in the day-to-day affairs of the company.

3. The trial court found that the document produced by revision petitioners, at the most, reveal that there was a dispute between petitioners and accused nos.1 to 3, in respect of management of the company in the year 1997. That does not mean that petitioners can be absolved from the liability to remit the contributions for the period referred to in the charge. Therefore, the charge against revision petitioners, according to

learned Magistrate, is not groundless warranting discharge under Section 239 of the Code.

4. Learned counsel appearing for revision petitioners vehemently contended that trial court has not appreciated the contentions raised by petitioners in the proper perspective. It was argued that in the light of the decision reported in **Employees State Insurance Corporation v. S.K.Aggarwal and others** [(1998) 6 SCC 288], the employer is the company and therefore, revision petitioners cannot be prosecuted as an “employee”,as defined under the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 ('the Act', for short). As per Section 14A of the Act, if the person committing an offence under the Act is a company only such persons who at the time of offence was in charge of and was responsible to the company for the conduct of the business of the company as well as the company shall be deemed to be guilty of the offence.

5. The charge is laid against revision petitioners and others under Section 406 IPC , as if they are personally liable for the offence. If there is default in payment of the provident

fund contributions, the employer alone will be liable and the persons who are in charge of and responsible to the company for the conduct of the business of the company as on the date on which the offence was committed can also be prosecuted for the offence. It was contended that the court below has not looked into this aspect and hence the order under challenge is liable to be set aside.

6. In the light of the argument raised, I have gone through the records in this case and I find that the revision petitioners were prosecuted for offence under Section 406 and 34 IPC , as if they are personally liable because of the default in payment of provident fund contribution. As pointed out by learned counsel for revision petitioners, as per Section 406 IPC, particularly the explanation, it is the “employer” who can be deemed to have been entrusted with the amount of contribution of the said fund and in violation of the Act, the employer shall be deemed to have dishonestly used the amount of the said contribution in violation of the law as stated in Explanation 1 of Section 406 of IPC.

7. The court has to look into the records produced in the case and enter a finding as to whether the revision petitioners personally committed an offence under Section 406 IPC or whether it is the company which is liable for the offence as defined under Section 405 IPC. On the basis of the report and the records produced before the court, if the court is satisfied that it is the company which has committed the offence, the court has to further look into Section 14A of the Act, to see whether revision petitioners can be said to be liable for the offence committed by virtue of Section 14A of the Act. But trial court has not applied its mind to these facts and therefore the court will have to reconsider the matter and dispose of the application afresh.

8. It appears from the records that the trial court has proceeded as if the revision petitioners committed offence in their personal capacity and their liability as persons in charge of and responsible for the affairs of the company on the date of offence. The first point to be considered is whether the offence is committed by the company or not as an employee and if so

whether the petitioners can also be made liable because of their liability by virtue of Section 14A of the Act.

9. First and foremost, the court has to decide whether the liability of the petitioners is personal liability or whether it is in the name of liability as the persons in charge of and responsible to the affairs of the company as on the date of offence as referred to in Section 14A of the Act. This has not been considered and hence, impugned order is liable to be set aside.

10. In the above circumstances, the order under challenge is set aside. The case is remanded to trial court for fresh consideration in the light of the observations made in the judgment. The trial court shall dispose of the petition for discharge in accordance with law, after hearing both sides and untrammelled by any of the observations made by this court on merits of the case.

This petition is allowed.

K.HEMA, JUDGE.

Krs.